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Indiana Law Journal

Volume 14 | Issue 5 Article 2

6-1939

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OHIO, INDIANA, ILLINOIS v. KENTUCKY FISHING RIGHTS IN THE OHIO RIVER

By JOHN D. T. BOLD*

For a total distance of 663.9 miles the Ohio River winds its way between the commonwealth of Kentucky and the States of Ohio, Indiana, and Illinois; from the mouth of the Big Sandy River at Catlettsburg, the boundary between West Virginia and Kentucky, to the confluence of the Ohio and Mississippi Rivers below Cairo Point.

Although famous as an important artery of transportation, as well as a source of disastrous floods, it is nevertheless locally important as a habitat of fish and a means of pursuing the fascinating sport of fishing. At least a million inhabitants of these three northern states reside within thirty miles of the northern bank of the river. For many thousands of them it represents their only opportunity to engage in the sport of fishing. In the swift waters below the numerous government dams, bass, jack-salmon, and perch provide fairly adequate sport for the game fishermen who cannot go to the lakes and streams of the North. In the quieter waters there may be found the elusive crappie, the blue-gill, and many varieties of cat-fish.

For a hundred years the inhabitants of Ohio, Indiana, and Illinois were permitted to fish in the Ohio River without let or hindrance on the part of the authorities of Kentucky, although as early as 1820 Chief Justice Marshall, in the case of *Handley's Lessee v. Anthony*,[1] held by way of dictum that the boundary of Kentucky extended to the low-water mark on the western or northwestern bank of the river.

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1 5 Wheat. 374, 5 L. ed. 113 (1820).

Kentucky's first fishing statute enacted in 1876 specifically exempted the Ohio River from its provisions.[2] A revision of her fishing laws in 1894 excepted the Ohio River from new provisions prohibiting the use of nets, seines, and traps.[3]

Not until 1918 did Kentucky attempt any discrimination against her northern neighbors with reference to fishing in the Ohio River. In that year a statute was enacted licensing the use of seines and nets in that river and providing for resident and non-resident distinctions.[4] Not until 1928 was a general licensing statute enacted. In that year a new statute provided for the licensing of all fishing by adult males, with a non-resident fee two and a half times the resident fee.[5] This latter statute has been rather vigorously enforced, particularly against non-residents.

At the outset, the Kentucky authorities were incensed at the sight of illegal seines, nets, and traps drying in open air on the northern banks as well as at the ease with which poachers operated from the sanctuary of the foreign shore.[6]

In 1935 the Conservation Departments of Ohio and Indiana entered into a "gentlemen's agreement" with the Kentucky Fish and Game Commission whereby Kentucky would recognize their licenses on the Ohio for pole and line fishing. Ohio and Indiana on their part agreed to police their banks for illegal seines, nets, and traps.[7] The next year there was a

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[2] Bullitt & Feland's Ky. Stat. (1881), c. 42.

[3] Ky. Acts 1894, c. 84.

[4] Ky. Acts 1918, c. 67.

[5] Ky. Acts 1928, c. 67.

[6] Prior to 1935 Indiana statutes exempted the Ohio River, as well as the Wabash and Lake Michigan, from provisions as to the unlawful use of nets, seines, trot lines.

Indiana Acts 1927, c. 37, sec. 17 made lawful the possession of nets, seines, etc., within one mile of the boundary waters if for use in such waters.

But Indiana statutes as to pollution, use of poison and explosives, bag limit, minimum length, shooting of fish, etc., have always applied to the Ohio River.

[7] As a part of the "gentlemen's agreement" Indiana agreed to procure an amendment to the 1927 Act so that the possession of nets, seines, traps, etc., would be unlawful along the Ohio River. This was done in Indiana Acts 1935, c. 207.

change of administration in Kentucky and the agreement was not renewed.

There have been numerous minor and local disturbances. Kentucky authorities have attempted, with discouraging results, to journey onto the northern bank to seize and destroy illegal fishing paraphernalia. Northern fishermen have attempted open defiance with rather indifferent success. Several years ago a fisherman, living at Yankeetown, Indiana, was caught in the act of fishing without a Kentucky license. In the ensuing altercation with two Kentucky wardens he was shot and killed. Sometime later, the warden who had allegedly delivered the fatal shot, was killed by gun-shot under mysterious circumstances near his home in Owensboro.

Effective conservation is impossible under present circumstances. Kentucky can do nothing about pollution of the stream from the northern bank, and can do very little about the wasteful and destructive fishing operations conducted from the safe haven of the foreign shores. Ohio, Indiana, and Illinois are not interested in protecting what Kentucky claims to be exclusively hers.

Vattel, in his *Law of Nations,*[8] suggests:

> "In view of the peace of Nations, the safety of States, and the welfare of the human race, it is not to be allowed that the property, sovereignty, and other rights of Nations should remain uncertain, open to question, and always furnishing cause for bloody wars."

It is our purpose to attempt a legal solution of the disputed question which may lead to certainty, peaceful and co-operative interstate relations, and effective conservation regulation and control.

At the time of the Revolution, the country situated to the northwest of the Ohio River, and known as the North Western Territory, was claimed by Virginia under her charter.[9]

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[8] Vattel, *Law of Nations* (Fenwich trans. 1916), Vol. 3, sec. 149, p. 159.

[9] Connecticut claimed a small strip running along Lake Erie. A deed of cession was also executed as to this.

In October, 1783, the Virginia legislature authorized its delegates in Congress to convey to the United States "all right, title and claim, as well of soil as of jurisdiction, which this Commonwealth hath to the territory or tract of country within the limits of the Virginia Charter, situate, lying and being to the northwest of the river Ohio."[10]

In March, 1784, a deed of cession was executed to the United States and accepted by Congress. This deed contained a stipulation that the settlers of Kaskaskies and St. Vincents (Vincennes) and the neighboring villages (these being the only inhabited sections of the territory at that time) should be guaranteed their possessions and titles and "the enjoyment of their rights and liberties."[11]

In July, 1787, Congress enacted the "Ordinance of 1787" which was entitled "An ordinance for the government of the territory of the United States northwest of the river Ohio." There were no words of description in the ordinance itself. In Article IV of the Ordinance it was provided:

> "That navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States . . . without any tax impost, or duty therefor."

In the first Congress after the Constitution it was formally re-enacted.[12]

In December, 1789, the legislature of Virginia passed an act, now known as the Virginia Compact, consenting under certain conditions that the district of Kentucky, then a part of Virginia, might be formed into a new and independent state.[13] Section II of that act, being the seventh condition, provided:

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10 Hening's *Laws of Va.*, Vol. 11, c. 18, p. 326.

11 *Ibid.* at p. 571.

12 1 Stat. 50.

13 Hening's *Laws of Va.*, Vol. 13, p. 17.

"That the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this Commonwealth and of the proposed state on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river."

Pursuant to that act, a convention of Kentucky delegates petitioned Congress for admission. By an act of Congress in February, 1791, Kentucky was admitted to the union as an independent state as of June 1, 1792.[14]

In 1820 the case of *Handley's Lessee v. Anthony*[15] was decided by the Supreme Court of the United States. It was an appeal from a decision of the Circuit Court for the District of Kentucky on an action of ejectment. Conflicting grants had been issued by Kentucky and by the United States (as a part of Indiana) to a peninsula on the Indiana side of the Ohio River. The land was surrounded by the river only at high water. Chief Justice Marshall delivered the opinion and characteristically seized the opportunity to go beyond the narrow question of the appeal and decide that the boundary of the Northwest Territory was the low-water mark on the western or northwestern bank of the Ohio River.

In 1890, the State of Indiana filed an original action[16] in the United States Supreme Court against Kentucky with reference to a boundary dispute over Green River Island, near Evansville, which Island, by a change of the course of the river had become contiguous to Indiana. In that case Indiana strenuously argued that Chief Justice Marshall's low-water mark decision was dictum and that the boundary question was still open for decision. However, the court held, in an opinion by Mr. Justice Field, that over seventy years acquiesence by Indiana in Kentucky's claim, and the property rights grown

[14] 1 Stat. 189. Included in this act is the congressional consent to the Virginia Compact.

[15] 5 Wheat. 374, 5 L. ed. 113 (1820).

[16] Indiana v. Kentucky, 136 U. S. 479, 10 Sup. Ct. 1051, 34 L. ed. 329 (1890).

up under Kentucky grants, forbade any disturbance of Kentucky's possession of, and jurisdiction over, that particular tract.[17]

The boundary question must be taken as settled. The boundary of Kentucky extends to the low-water mark on the Ohio, Indiana, and Illinois side of the river.[18] We may also take it as settled that Kentucky has title to the stream-bed of the river to the low-water mark on the opposite shore. These concessions might settle the question of fishing rights if we should also concede that the question is limited to a contention for a common right of fishing in private waters against the will of the riparian or stream-bed owner. There can be no doubt but that at common law an owner of the stream-bed under private waters had the exclusive right of fishing in those waters.

But it is our thesis that we have here a situation wherein three sovereign states, as *parens patriae* of their respective citizens, are contending for the right of fishing in the Ohio River, a boundary stream that is a tremendous artery of public commerce; a river in which Kentucky, as riparian sovereign, has only limited rights under the Virginia Compact; a river in which Ohio, Indiana, and Illinois, as riparian owners to the low-water mark on their shores, were granted certain rights under the Virginia Compact.

Are the waters of the Ohio *private* or *public?* Does the Virginia Compact merely grant a narrow easement of passage or navigation to the states on the opposite shore? Or does the Compact grant general rights of common use?

Before proceeding with our construction of the Compact it would seem advisable to consider the nature and origin

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[17] The tract of land in question comprises an area of about five square miles. It now lies north of the river, solidly contiguous to Indiana, and adjacent to the City of Evansville. It now contains the Dade Park race track and numerous liquor dives and dance halls. It is a sort of "no man's land" in that Kentucky police authorities do not police the area except during racing meets, while, of course, the Indiana authorities are precluded from doing so.

[18] For a comprehensive treatment of the boundary question see Coppock, *The Southern Boundary of Ohio* (1880), 9 American Law Record, 449, 529, 577.

of the common right of fishing, or rather, to ascertain the circumstances under which there can be said to be a *right* of fishing, as distinguished from a mere *license* to fish by the permission or sufferance of the riparian owner of the streambed.

The common right of fishing, or *jus piscandi,* appears to have had ancient recognition. Grotius, in his *Rights of War and Peace* (1625), tells us that under the old Roman law all ports and rivers were public waters; that no private person could appropriate to himself the right of fishing in public waters.[19]

Bracton, in his *De Legibus Angliae,* written about the year 1250, said:[20]

"all rivers and ports are public, and accordingly the right of fishing in a port and in rivers is common to all persons."

The common right of fishing in public waters was one of the rights asserted at Runnymead. The *Magna Charta* (1215) provided in Chapter 23 for the removal of weirs which had been permitting certain individuals to interfere with the enjoyment of others of the common right of fishing.

In 8 Edw. 4.19.a (1450) it was stipulated that "every man may fish in the sea of common right." And in *Warren v. Matthews*[21] it was held that "every subject of common right may fish with lawful nets in a navigable river as well as in the sea."

In the case of *Ex parte Bailey*[22] the Supreme Court of California asserted:

"Until actually reduced to possession, the fish belong to all the people of the state in common, and those engaged in the exercise of

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[19] Book II, c. III, sec. IX and X.

[20] (Twiss trans. 1878), Book I, c. 12, sec. 6.

[21] 6 Mod. 73, Salk. 357 (1704).

See also Ward v. Cresell, Willes 265 (1741) wherein the Lord Chief Justice held that a man could no more have an exclusive right of fishing in navigable waters than an exclusive right "to travel on the King's highway."

[22] 155 Cal. 472, at 474, 101 Pac. 441 (1909).

the common right to take them from what is a public highway [coastal waters off San Monica], open to all people alike, cannot be impeded. . . ."

The Supreme Court of the United States in *Lawton v. Steele*[23] quoted with approval the statement that "at common law the right of fishing in navigable waters was common to all."

However, it should be noted that in the common law of England the term "navigable waters" was restricted to such waters as were affected by the ebb and flow of the tide. While in certain non-tidal waters there may have been a common right of passage, those waters were nevertheless private for other purposes and subject to exclusive fishing rights in the riparian owner.[24] The true line of distinction appears to have been between public and private waters rather than between navigable and non-navigable waters.

Considering the great topographical differences between England and the United States one can readily understand the confusion that has arisen in attempting to apply the English common law of navigable waters to American lakes and streams, particularly with reference to the incident of the right of fishing.

With reference to the purely *intrastate* problem of common fishing in streams navigable in fact, there appear to be three distinct lines of decision. One holds that if there is a common right of navigation, the right of fishing is incident to the right of navigation. It is based on the following logic: The right of navigation gives one the right to be on the waters without trespass; the fish in the waters are the property of no man until capture, and on capture belong to the captor; therefore, one who has the right to be there may take there what belongs to no man until taken.[25]

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[23] 152 U. S. 133, 14 Sup. Ct. 499, 38 L. ed. 385 (1894), quoting from State v. Roberts, 59 N. H. 256 (1879).

[24] See Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. ed. 331 (1893), wherein Mr. Justice Gray delves deeply into the early common law of riparian titles and its development in the United States.

[25] See opinion of Cassoday, C. J., in Willow River Club v. Wade, 100 Wis.

The other two theories deny that the right of fishing is incident to the right of navigation. Both contend those rights are independent. Both admit that there is a common right of fishing in *public* waters. Their difference lies in their definitions of "public waters".

One of the theories asserts that waters navigable in fact are, *ipso facto,* "public waters"; that while riparian owners may hold title to the thread of the stream, the waters of the stream are nevertheless "subject to all the rights in common characteristic of public waters".[26]

The remaining theory insists on the English common law rule that the only public waters are those under which the bed belongs to the Crown or State; that while there may be a right of navigation in private waters, such a right is strictly limited to navigation and does not include any right of fishing.[27]

The arguments for and against these several theories, although exceedingly tenuous, are interesting, and a study of the several cases indicated in the notes[28] is recommended to those who may be interested in the intrastate problem. If the "common highway" provision of the Ordinance of 1787 was all we had, the question would be of utmost importance here.[29] However, since under any theory there is admittedly a right of fishing in public waters, we shall not develop further that particular problem; but shall consider the possibilities that under the Virginia Compact, the waters of the Ohio River as they form the boundary between Kentucky and the Northwest Territory, are common or public waters.

86, at p. 91 to 103, 76 N. W. 273 (1898). See also dissenting opinions of Campbell, J., and Morse, J., in Sterling v. Jackson, 69 Mich. 488, at p. 502 and 519, 37 N. W. 845 (1888).

[26] Opinion of Marshall, J., in Willow River Club v. Wade, *ibid.,* p. 103 to 118.

[27] Majority opinion in Sterling v. Jackson, *ibid.*

[28] See notes 24, 25, and 26, *supra.*

[29] The Willow River case, Diana Shooting Club v. Husting, 156 Wis. 261, 145 N. W. 816 (1914), and the dissenting opinion of Morse, J., in the Sterling case, all hold that the Ordinance of 1787 made public waters out of all rivers in the Northwest Territory that were navigable in fact, regardless of riparian titles to the stream-bed.

The Compact provided that "the use and navigation of the river Ohio shall be free and common etc." What is the meaning of "use"? Is it synonymous with "navigation"? Or does it mean something more?

The noun "use", in a technical sense, has been defined as a "right to take the profits of land of which another has the legal title and possession".[30] In a general sense it has been held to mean "the right to enjoy, hold or occupy, and have the fruits thereof".[31]

It is a well recognized rule of construction that an attempt should be made to give meaning to all words. This means that there is a presumption against the two nouns having synonymous meanings. Here we have the *"use . . . of* the river Ohio" and the *"navigation* of the river Ohio". Does this not mean that there should be a common *use* of the river as well as a common right of *navigation?* It has been held that "the word 'use', like all other words of our language, is to be interpreted with some reasonable regard to the connection in which it is employed".[32]

What are the possible *uses* of a river, other than navigation? There are the domestic uses; the use of the waters for drinking, cooking, laundering, etc. There are also the industrial uses, for the generation of steam or water power, the cooling and washing of industrial products and processes, and a thousand others. There are the sanitary uses; for the treatment and disposal of sewage and waste. There are the agricultural uses; for the irrigation of crops and the watering of stock, etc.

Then there are the recreational uses of the river which have been so lyrically enumerated in the dissenting opinion of Morse, J., in *Sterling v. Jackson*:[33]

"The right to bathe in its cool depths, to feast the eye upon its lovely landscapes of water, wood, and meadow; the right to bask in the glad

30 Bouvier Law Dic. (Baldwin's ed. 1934).

31 Philadelphia v. Merchant & Evans Co., 296 Pa. 126, 145 Atl. 706 (1929).

32 Ury v. Mod. Woodmen, 149 Iowa 706, 127 N. W. 665 (1910).

33 See note 25, *supra.*

sunshine, to look up into the blue sky, to breathe in the pure air; the right to hear the gentle murmur of the wind, to listen to the music of the singing birds, or even to note the ripple of its waters as they beat upon the shores of the riparian owner; the right to fill and gladden every sense with the joy and beauty of nature,—are mine; and the proprietor of the soil under the bed of the stream has no authority or power to drive me away. For these things are free, and God has ordered it so.

By what law, divine or human, written or unwritten, is the riparian owner authorized, like a policeman upon a crowded city street, to order me to 'move on'?"

Then Judge Morse touches upon the uses piscatorial:

"So have I also the right to cast my line into its waters, to lure, with baited hook or painted fly, the bass and perch into my hand or landing net. . . . For these things are also free, and the property of no man until taken."

There is no record of Kentucky ever having challenged or attempted to interfere with any of the enumerated uses of the river on the part of the people of Ohio, Indiana, and Illinois, other than the uses piscatorial.[34]

Unfortunately, there do not seem to be any judicial decisions or legal writings construing the "use and navigation" provision of the Virginia Compact, or any similar provision of any other statute or compact. It is our thesis that it means there shall be a free and common *use* of the river Ohio for every proper purpose for which a river could be used.

But we need not rely exclusively on the "use and navigation" provision of the Compact. The same section provides that Kentucky and the states which may possess the opposite shores of the river shall have concurrent jurisdiction over the Ohio River. It was so held by the United States Supreme

[34] We have chosen to ignore the use of the river for the hunting of water-fowl. It is relatively unimportant on the Ohio River; the current is too swift; the use of motor craft forbidden. Further, migratory water-fowl seldom descend to the main river but rather to the bayous and back-waters where jurisdiction is certain.

Court in the case of *Wedding v. Meyler* in 1904, the opinion being written by the late Mr. Justice Holmes.[35]

In *Arnold v. Shields*,[36] decided by the Court of Appeals of Kentucky in 1837, Chief Justice Robertson declared in his opinion that:

> "Jurisdiction, unqualified, being, as it is, the sovereign authority to make, decide on, and execute laws, a concurrence of jurisdiction, therefore, must entitle Indiana to as much power—legislative, judiciary, and executive, as that possessed by Kentucky, over so much of the Ohio river as flows between them; and consequently, neither of them consistently with the compact, may exercise any authority over their common river, so as to destroy, or impair, or obstruct the concurrent rights of the other."

It is difficult to imagine a stronger statement or definition of the meaning of "concurrent jurisdiction". In this connection it should be noted that the *Handley* case, putting the boundary at low-water mark, had been decided seventeen years previously; that Judge Robertson did not qualify his opinion accordingly but instead referred to the Ohio as "their common river"; that for eighty years thereafter it was the consistent legislative policy of Kentucky to treat the Ohio for all purposes, including fishing, as a common river, having carefully excepted that river from its fishing laws until 1916.

The act of Congress admitting Oregon into the Union provided that Oregon should have concurrent jurisdiction on the Columbia River where it forms a common boundary and fixed the boundary at "middle channel".[37] The act also provided that the Columbia River and other navigable waters should be "common highways and forever free".

In the case of *In re Mattson*[38] a citizen of Washington, convicted in Oregon for the offense of Sunday fishing (an offense only under the laws of Oregon), which offense had been committed on the Washington side of the river, applied

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35 192 U. S. 573, 24 Sup. Ct. 322, 48 L. ed. 570 (1904).

36 35 Ky. (5 Dana) 18 (1837), at p. 22.

37 11 Stat. 383.

38 69 Fed. 535 (1895, U. S. C. C. D. Ore.).

in the United States Circuit Court in the District of Oregon for a writ of habeas corpus. Hanford, District Judge of Washington, sat with Judge Bellinger of the District of Oregon. Judge Bellinger granted the writ and in his opinion said:

"The question is not to be decided upon a technicality. Whether, in legal effect, the boundary of each state is limited by its own shore, or by the middle channel, with concurrent jurisdiction over the river in either case, the result is the same."

Thus it will be noted that the boundary difference between Oregon and Washington (middle channel) and Kentucky and Indiana (low-water mark on the Indiana side) is not to be considered as having any legal effect on our problem. Later in his opinion Judge Bellinger defines the meaning and effect of "concurrent jurisdiction" as follows:

"The word 'concurrent', in its legal and generally accepted definition, means acting in conjunction, and when applied to the jurisdiction of Oregon to enact penal laws for the Columbia river, it can only mean the power to enact such criminal statutes as are agreed to or acquiesced in by the state of Washington, or as are already in force within its jurisdiction."

Some twelve years later another petition for a writ of habeas corpus came before the same court in the case of *Ex parte Desjeiro*.[39] Here Desjeiro, a subject of Italy domiciled in California, was convicted in Oregon for violating an Oregon statute which limited fishing rights in the Columbia to citizens of Oregon, Washington and Idaho. There was evidence that he had caught fish on both sides of the river. Said the court:

"An examination of the laws of the State of Washington will disclose the fact that there is no such offense established within that state, and hence there is no concurrence in the laws of the two states as to the offense. . . . It is the offense of fishing without being a resident of the state; and, the state of Washington not having con-

[39] 153 Fed. 1004 (1907, U. S. C. C. D. Ore.).

curred in this legislation, the act is void as to all persons, whether they be citizens of Washington or California, and is within the doctrine of the Mattson Case."

The *Mattson* and *Desjeiro* cases assert, in effect, that as to waters embraced in concurrent jurisdiction, neither state may enforce any fishing law that does not have the concurrence of both states. This seems to be an extreme doctrine. It will at once occur that the result leaves the states in a seemingly impossible situation with the river a "no man's land"; that it might have been sufficient to have held that neither state could enforce its own non-concurrent laws beyond middle channel against citizens of the opposite state. But it should be considered that the fight here was over salmon fishing, a very valuable commercial privilege; that the purpose of "concurrent jurisdiction" over boundary streams is to prevent controversies of jurisdiction over the position of so intangible and indefinite a boundary as "middle channel"; that to limit in any way the operation of non-concurrent laws to the boundary would defeat the purpose and intent of the device of "concurrent jurisdiction".[40]

It might seem that the Indiana-Kentucky boundary of "low-water mark" is more definite than "middle channel". But the term "mark" is a misnomer. Where was the low-water mark in 1820 when Marshall decided the *Handley* case? Where is that mark today? Is the boundary fixed at the 1820 mark, wherever that might have been, or, does it vary from year to year? If it varies, is it last year's low-water mark or this year's? What has been the effect on the boundary of the War Department's lock and dam system whereby a minimum nine foot stage is maintained? If the river were permitted to assume its natural level during times of drought, the War Department's channel soundings indicate that tremendous sections of the river bed would emerge contiguous

[40] For a general discussion of the device of concurrent jurisdiction over interstate boundary waters and the problems incident thereto, see Rorer on *Interstate Law* (1893), chap. XXXIII.

"Middle channel" does not mean the mathematical center of the river

to Indiana and to the north of such low-water mark.[41] A full consideration of the facts would seem to indicate that there exists an even greater necessity on the Ohio for the full meaning and construction of "concurrent jurisdiction" than the Oregon-Washington situation might justify.

But to return to the Oregon-Washington controversy: In 1909 the case of *Nielsen v. Oregon*[42] was decided by the Supreme Court of the United States. In that case a Washington citizen, using a net legal under Washington statutes, and fishing on the Washington side of the river, was convicted in Oregon under an Oregon statute prohibiting the use of such a net. The court, by Mr. Justice Brewer, held that while either state could punish an act on the river that was *malum in se* and prohibited and punishable under the laws of both states, one state could not punish an act simply *malum prohibitum* that was committed within the territorial limits of the other and permitted by the laws of the other. Mr. Justice Brewer refused to determine any other situations, such as whether it would make any difference if the act had been committed within the boundary of Oregon. In the concluding paragraph of his opinion he made the following comment:

"There is little authority upon this precise question, but see *In re Mattson,* 69 Fed. Rep. 535, and *Ex parte Desjeiro,* 152 Fed. Rep. 1004. See also *Roberts v. Fullerton,* 117 Wis. 222; *Rorer on Interstate Law,* p. 438 and following."

In *McGowan v. Columbia River Packers*[43] the District Court of Washington insisted upon retaining jurisdiction of a suit brought there to abate a nuisance on the Oregon side of the river which consisted of certain set nets. The United States Supreme Court held that the courts of Washing-

measuring from bank to bank. It means the center of the navigation channel. It is also called "the thread of the stream."

[41] For complete data see *The Ohio River* published in 1935 by the U. S. Gov. Prtg. Office.

[42] 212 U. S. 315, 29 Sup. Ct. 383, 53 L. ed. 528 (1909).

[43] 245 U. S. 352, 38 Sup. Ct. 129, 62 L. ed. 342 (1917).

ton were without jurisdiction. Again the court, in its opinion by Mr. Justice Holmes, refused to go beyond the narrow issue.

As the result of the situation created by these decisions, in 1918 the states of Oregon and Washington, through legislative commissions, and with the consent of Congress, entered into a Compact providing "for the regulation, preservation and protection of fish in the waters of the Columbia River" and further providing that new or additional statutes must have the concurrence of both states. Washington-Oregon fishing disputes are now a thing of the past.

In 1904 the case of *Wedding v. Meyler*[44] came before the Supreme Court of the United States. Wedding had secured a default judgment in an Indiana court, the process having been served on Meyler, who at the time was aboard a boat on the Ohio river, the boat being beyond the low-water mark and in Kentucky waters. Wedding brought suit in Kentucky to enforce his judgment. The Court of Appeals of Kentucky held the service of process ineffective,[45] but Justice Hobson wrote a strong dissent in which he suggested that the Compact created a common jurisdiction over the river. He urged that:

"Her [Virginia's] intention was not only to guarantee to the people of the States possessing the opposite shores the free use of this great waterway, then so essential to them, but to clothe these states with power to protect persons on the river in life, liberty, and property. Otherwise, the use and navigation of the river might be substantially destroyed and become a menace to society on either shore."

Mr. Justice Holmes delivered the opinion of the Supreme Court in the appeal taken, in which he gave the following cryptic definition of "concurrent jurisdiction":

"Concurrent jurisdiction, properly so-called, on rivers familiar to our legislation, means the jurisdiction of two powers over one and the same place. There is no reason to give unusual meaning to the phrase."

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44 192 U. S. 573, 24 Sup. Ct. 424, 48 L. ed. 570 (1904).

45 107 Ky. 310, 53 S. W. 809 (1899).

At another place in his opinion Mr. Justice Holmes inferentially criticizes the device where he says:

"The conveniences and inconveniences of concurrent jurisdiction both are obvious and do not need to be stated. We have nothing to do with them when the law-making power has spoken."

The court, by Mr. Justice Holmes, specifically decided that the grant of "concurrent jurisdiction" enabled Indiana to serve process with effect below low-water mark on the river, but refused to go beyond that narrow issue except to say that concurrent jurisdiction does not extend to permanent structures attached to the river bed and within the boundary of one or the other state.

In 1916 one Frank Nicoulin, a resident of Kentucky, was convicted by a Kentucky Justice of the Peace of using an unlawful seine in the Ohio River and in Kentucky waters in violation of a Kentucky statute enacted that same year. His conviction was upheld in the Circuit Court and in the Court of Appeals of Kentucky.[46] He prosecuted a writ of error to the Supreme Court of the United States. That court, in a memorandum opinion by Mr. Justice McReynolds, affirmed the court below.[47] The case was apparently submitted on the briefs and record without argument and Mr. Justice McReynolds' one page memorandum fails to set out essential facts and only very loosely states the issue. It does say by way of conclusion that:

"And we think it clear that no limitation upon the power of that Commonwealth to protect fish within her own boundaries by proper legislation resulted from the mere establishment of concurrent jurisdiction by the Virginia Compact."

In order to get the facts and issues we went to the Transcript and Briefs as filed in the Supreme Court. The Transcript does not set out Nicoulin's residence but merely describes him "as a fisherman earning his living by fishing in

[46] 172 Ky. 473, 189 S. W. 724 (1916).

[47] Nicoulin v. O'Brien, 248 U. S. 113, 39 Sup. Ct. 23, 63 L. ed. 155 (1918).

the Ohio river where it forms part of Jefferson County, Kentucky, by seining and otherwise." However, Nicoulin's brief, at page two, avers that he resides in Louisville, Kentucky. The brief of the Kentucky Game and Fish Commission, as *amicus curiae,* at page 41 asserts that Nicoulin was a citizen of Kentucky. The briefs also show that Nicoulin contended that the Kentucky act of 1916 was unconstitutional because Indiana had not concurred; that this was the sole issue asserted by either side; that the Kentucky Game and Fish Commission did not contend that Kentucky had a right to enforce its fishing statutes on the river against citizens of Indiana but confined its stand to a contention that its statutes were not invalid because Indiana had not concurred. Indeed, at page 41 of their brief, the Commission points out that:

"Further the State of Indiana is not a party to this action and this proceeding here could not be effective or binding against her or her rights."

The Commission contended, in effect, that this was just a controversy between Kentucky and one of its own citizens over an act committed within the territorial boundaries of Kentucky. While the briefs discuss rather fully the question of "concurrent jurisdiction" they do not touch upon the "use and navigation" provision, nor is there any attempt to analyze the peculiar nature of the right of fishing in public waters.

We do not regard Mr. Justice McReynolds' memorandum in the Nicoulin case as constituting any serious obstacle to our thesis. It does probably mean that the United States Supreme Court will not uphold the broad doctrine of the *Mattson* and *Desjeiro* cases. The court had so held earlier in the *Neilson* case. But it does not hold that Kentucky may enforce its fishing statutes on the Ohio River, where it forms a common boundary, against citizens of Ohio, Indiana, and Illinois; that citizens of those three states do not have a common right of fishing in the Ohio with citizens of Kentucky.

No one can foretell what the United States Supreme Court would hold with reference to our thesis. But a consideration of the question would seem to suggest that the Supreme Court be given an opportunity to decide one way or another; that the issue should not be surrendered.

The government of the United States has plans for a giant dam in the Ohio River near Paducah, Kentucky, that will, if erected, create a tremendous lake extending beyond Evansville and flood thousands of acres of Indiana and Illinois land. Will this create a new low-water mark and enhance Kentucky's claimed exclusive waters by those thousands of acres?

The Kentucky boundary can not be determined by looking at the northern bank and noting the line of demarcation between land and water. Middle channel could be ascertained by soundings, although if that were the mark in the Ohio it would be continually altered by the operation of government dykes and dredges. The effect of the maintenance of a nine foot stage by operations of the War Department's system of locks and dams has already been discussed. What of the effect on the low-water mark boundary when a government dredge cuts off fifty feet of the Indiana bank?

If the court should hold that the citizens of Indiana, Ohio, and Illinois have a common right of fishing in the Ohio, and that any border state may enforce its own fishing statutes against its own citizens, it would not, of course, end all controversy. There would still be differences in the licensing of nets, traps, and seines, bag limit, minimum length, number of hooks, and closed season. But once the rights of the northern states were established it should then be possible to arrange a settlement by compact as did Washington and Oregon.

How could the issue be raised in the Supreme Court of the United States? It might be accomplished in a tortuous manner by some citizen of Ohio, Indiana, or Illinois seeking arrest and conviction by Kentucky and by then prosecuting an appeal, or, by application to the Federal court for a writ

of habeas corpus. Such a case, particularly if the point of location of the low-water mark were also raised, would be most interesting. The writer can think of some ideal locations above a sand-bar extending from the Indiana shore close to the Kentucky bank, which sand-bar, if the river were permitted by the War Department to assume its low-water level, would be above the water and contiguous to the Indiana shore. It might also be accomplished by the institution of an original action in the Supreme Court under Section 2 of Article III of the Constitution. In view of the decisions of that court in *Missouri v. Illinois*[48] and the two cases of *Kansas v. Colorado*[49] it could hardly be contended that such an action would not be proper on the theory that the state is *"parens patriae"*, trustee, guardian, or representative of all or a considerable portion of its citizens. Further, the states of Ohio, Indiana, and Illinois are directly interested; their revenues through the sale of fishing licenses are affected; their right to the resources of the river is denied.

To non-fishermen this question will probably seem academic and immaterial.[50] The devotees of the art made famous by Izaak Walton, on whichever side of the Ohio they may reside, will at once consider it of major importance—perhaps of more importance than Wages and Hours or Separation of Powers. However, the common right of fishing is one of those "fundamental rights" of a democracy. Since it was recognized in the *Magna Charta,* it is of more ancient origin than the rights of free speech and free press. It is not a right that should be lightly considered or freely surrendered.

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48 180 U. S. 208, 21 Sup. Ct. 331, 45 L. ed. 497 (1901).

49 185 U. S. 125, 22 Sup. Ct. 552, 46 L. ed. 838 (1902); 206 U. S. 46, 27 Sup. Ct. 655, 51 L. ed. 956 (1907).

50 It is almost safe to assume that Mr. Justice McReynolds is not a fisherman. It is more certain that Morse, J., of the Supreme Court of Michigan, was a fisherman of long and extensive practice. State courts almost invariably split on the common fishing issue. Their opinions seem to indicate that the courts divide on a fisherman-nonfisherman line.

INDIANA LAW JOURNAL

Published Bi-Monthly October to August, inclusive, by the
Indiana State Bar Association